

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LARON JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 28, 2004

No. 248480

Calhoun Circuit Court

LC No. 02-004605-FH

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for two counts of third-degree criminal sexual conduct, MCL 750.520d. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the court erred in allowing him to be impeached with evidence of his prior convictions. A witness's credibility may be impeached with prior convictions if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Crimes of theft are minimally probative, and are, thus, admissible only if the probative value outweighs the prejudicial effect. *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499 (1988). MRE 609(b) provides that the probativeness is to be measured by the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. In determining the prejudicial effect, "the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor." MRE 609(b). A trial court's failure to articulate its analysis on the record is error, but if it appears from the record that the court was aware of the relevant factors and its discretion, the error does not itself require reversal. *People v McDaniel*, 256 Mich App 165, 168; 662 NW2d 101 (2003).

The trial court reviewed the appropriate factors in determining that the probative value outweighed the prejudicial effect. The convictions were probative of defendant's credibility, and the convictions were not similar to the charged offenses. Although the court did not state on the record that the convictions were recent, it was made aware of the date of the convictions in the prosecutor's argument on the record, and there is no showing that the age of the convictions would have affected the court's ruling. *McDaniel, supra*. Thus, there is no error requiring reversal.

Defendant also argues that the trial court erred in scoring OV 10 and OV 11 at sentencing. The sentencing court has discretion in determining the number of points a guidelines variable should be scored provided that there is evidence on the record which adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A scoring issue may also entail a question of statutory interpretation, which is reviewed de novo. *Id.*

MCL 777.40(1)(b) provides that OV 10 should be scored ten points if the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status. Where complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim's youth in committing the sexual assault. The fact that complainant was almost sixteen does not diminish the fact that defendant exploited her youth. Accordingly, the trial court properly exercised its discretion in scoring OV 10 at ten points.

MCL 777.41 provides that OV 11 should be scored twenty-five points if another criminal sexual penetration occurred, beyond the penetration that forms the basis of the conviction. In *McLaughlin, supra*, this Court found that where a defendant is convicted of multiple counts of CSC, a sentencing court should score the other penetrations, even though they were included in separate charges. *Id.* at 677. The trial court properly scored OV 11 for the penetration that was involved in the second count.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra